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No. 98-1929

In the Supreme Court of the United States

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioners' request for attorneys' fees because petitioners did not achieve any success on the merits of their claims.

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OPINIONS BELOW

The order of the court of appeals denying petitioners' eligibility for an award of costs and attorneys' fees (Pet. App. 2-3) is unreported. The opinion of the court of appeals on the merits remanding the case to the Environmental Protection Agency (Pet. App. 4-17) is reported at 134 F.3d 388.

JURISDICTION

The order of the court of appeals denying petitioners' motion for costs and attorneys' fees was entered on December 31, 1998. A petition for rehearing was denied on March 3, 1999 (Pet. App. 1). The petition for a writ of certiorari was filed on June 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 307(f) of the Clean Air Act (CAA) provides that, in any proceeding for judicial review under the Act, a court "may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate" (42 U.S.C. 7607(f)). In the underlying suit in this matter, petitioners—the American Lung Association, two of its individual members, and the Environmental Defense Fund—sought review of the Environmental Protection Agency (EPA) decision under CAA Section 109(d)(1), 42 U.S.C. 7409(d)(1), not to revise the National Ambient Air Quality Standards (NAAQS) for sulfur dioxide (SO_2) to add a five-minute standard to protect against short-term, high-level SO_2 bursts. Pet. 2. CAA Section 109(d)(1) directs EPA to review and revise the NAAQS, "as may be appropriate," every five years (42 U.S.C. 7409(d)(1)). In conducting its review, EPA concluded that short-term peak SO_2 bursts, occurring sporadically and from specific sources, did not pose a broad public health problem warranting revision of the national standards. Pet. App. 5.

In challenging EPA's decision, petitioners asserted that "by failing to establish a five-minute NAAQS capping SO sub 2 emissions at 0.60 [parts per million], EPA has violated its statutory responsibility to protect the public health." Pet. App. 12. Petitioners also contended that the Administrator's analysis of the facts amounted to a conclusive finding that SO_2 bursts adversely affect asthmatics' health, thereby triggering her duty to promulgate a new NAAQS. *Id.* at 13. As relief, petitioners requested the court of appeals to vacate EPA's decision.

Noting that petitioners challenged much of the data the Administrator relied upon, as well as her conclusions based on those data, the court of appeals first stated that it would not "second-guess EPA in its area of special expertise." Pet. App. 12. Therefore, the court accepted EPA's "analysis of the exposure studies in the record, as well as the implication of her analysis." *Id.* at 12-13. Beyond that, the court did not reach the merits of petitioners' claims, finding instead that the Administrator had not adequately explained her decision, *ibid.*, and remanding the case to permit her "to explain her conclusions more fully." *Id.* at 16-17.

In doing so, the court of appeals stated that it "need not resolve the debate between the parties over whether the Clean Air Act authorizes the Administrator to decline to protect an identifiable group of asthmatics from a known adverse health effect." Pet. App. 16. The court went on to state that "the Administrator may well be within her authority to decide that 41,500 or some smaller number of exposed asthmatics do not amount to a public health problem warranting national protective regulation" (*ibid.*). See also *id.* at 15 (finding that without further explanation by the Administrator, the court could not review her decision); *id.* at 17 ("we can leave the issue of the scope of her authority for another day"). The court also determined that it need not decide the issue of whether the Administrator's analysis amounts to a conclusive finding that SO_2 bursts adversely affect asthmatics' health. *Id.* at 13.

Pursuant to a Settlement Agreement with EPA, petitioners did not seek rehearing on the merits of the decision. They did, however, move for attorneys' fees under CAA Section 307(f). EPA opposed the request for attorneys' fees on the basis that petitioners had not achieved a modicum of success on the merits of their

claims and that an award of fees was, accordingly, not appropriate. Finding that petitioners' request for fees is controlled by *Sierra Club* v. *EPA*, 769 F.2d 796 (D.C. Cir. 1985), the court of appeals denied the petition for attorneys' fees. The court determined that petitioners "did not meet with 'a modicum of success on the merits' because '[t]he agency may be able to justify its position with a simple response containing no reformation of the challenged portion of the rules.'" Pet. App. 3 (internal citation omitted).

ARGUMENT

Section 307(f) of the CAA authorizes an award of costs and attorneys' fees when the reviewing court "determines that such [an] award is appropriate." The court of appeals in this case determined that no such award was appropriate since petitioners did not "meet with 'a modicum of success on the merits.'" Pet. App. 3. In exercising the broad statutory discretion afforded it under Section 307(f), the court simply applied familiar legal principles to the specific facts in this case. The decision does not conflict with any decision of this Court or another court of appeals, and is not of sufficient importance to warrant review by this Court.

1. Petitioners emphasize that Section 307(f) was not intended to restrict the award of fees to situations in which the party seeking fees has prevailed. But, as this Court emphasized in *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 686 (1983), Section 307 "does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorneys' fees." Nothing in *Ruckelshaus*, or in any other case cited by petitioners, suggests that Section 307(f) was intended to require the court to award fees when it determines that the applicants' lack of success on the merits makes

such an award inappropriate. Indeed, *Ruckelshaus* and almost all the other cases cited by petitioners involved consideration of the quite different question whether an award that had been made was authorized by the statute.*

An award of attorneys' fees is typically considered "appropriate" if a plaintiff prevails on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit. *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983). Although a fee award will be approved even if the party awarded the fee has not achieved a "major success" in the litigation, the party still must achieve "some success" on the merits of its claims for purposes of fee entitlement. *Ruckelshaus*, 463 U.S. at 688. In defining what constitutes the requisite level of success, this Court has explained that a party must prevail on some aspect of the merits of its claim in a way that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar* v. *Hobby*, 506 U.S. 103, 111-112

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* The sole exception is *Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. 782 (1989). In that case, the district court recognized (*id.* at 787) that petitioners "had achieved 'partial success,'" but refused to award attorneys' fees in a civil rights case because in the Fifth Circuit "the test for prevailing party status is whether the plaintiff prevailed on *the central issue*" in the case. *Ibid.* This Court granted certiorari in *Garland* to resolve the conflict in the circuits on that test (*id.* at 784), and ultimately rejected the Fifth Circuit test. Nevertheless, in *Garland* the Court recognized that no fee award would be appropriate "where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*," the finding the court made in denying fees in the instant case. *Id.* at 783.

(1992). See also *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989).

To make this determination, a court must "focus on the precise factual/legal condition that the fee claimant has sought to change, and then determine if the outcome confers an actual benefit or relief from a burden." *Grano* v. *Barry*, 783 F.2d 1104, 1108-1109 (D.C. Cir. 1986) (citation omitted). In some circumstances, a remand may qualify a petitioner as a prevailing party for the purpose of entitlement to attorneys' fees. *Shalala* v. *Schaefer*, 509 U.S. 292, 297-298 (1993). However, the petitioner still must demonstrate that it has succeeded on a significant issue in litigation which achieved some of the benefit sought in bringing the suit. *Id.* at 302.

2. In petitioners' view, the court of appeals' refusal to award attorneys' fees in this case imposes a "too stringent 'prevailing party' test for purposes of § 307(f)" and "would bar fees for a claim that would have satisfied traditional prevailing party tests." Pet. 13. This argument overlooks the crucial finding underpinning the court of appeals' denial of attorneys' fees—that the petitioners did not obtain the "modicum of success" on the merits (Pet. App. 3) that would make an award of attorneys' fees "appropriate."

a. While the court of appeals remanded the case to EPA to "permit the Administrator to explain her conclusions more fully," Pet. App. 16, it did not "grant[]" the petition for review as petitioners contend (Pet. 3). The court did not accept, or even resolve, petitioners' arguments on the merits. Instead, the court concluded that "[w]e therefore need not resolve the debate between the parties over whether the Clean Air Act authorizes the Administrator to decline to protect an identifiable group of asthmatics from a known adverse health effect." Pet App. 16. See also *id.* at 15 (stating

that the court could not review the Administrator's decisions without her answers to certain questions). Likewise, petitioners did not succeed in "winning" a decision that "rejected EPA's decision as not meeting the basic tests for reasoned decision-making." Pet. 12. The court of appeals did not find that EPA's decision was unreasonable, arbitrary, or capricious. Indeed, as the court explained, "[t]he agency may be able to justify its position with a simple response containing no reformation of the challenged portion of the rules." Pet. App. 3 (quoting *Sierra Club* v. *EPA*, 769 F.2d 796, 806 (D.C. Cir. 1985)). And while the case was remanded to "permit the Administrator to explain her conclusions more fully" (Pet. App. 16), she was not ordered to undertake a new rulemaking or required to "reconsider the public health consequences" (Pet. 17) of her decision as petitioners allege. Indeed, the sole basis for the court of appeals' remand decision was an argument not raised by petitioners—that the EPA Administrator had failed adequately to explain her actions.

Thus, notwithstanding petitioners' contrary characterization of the court of appeals' decision, petitioners have not obtained the "modicum of success" necessary for an award of attorneys' fees and costs. Nor can petitioners' effort to cast the remand as a "substantive" as opposed to "procedural" victory (Pet. 15-16) affect their entitlement to fees. At bottom, the court of appeals' decision does not provide petitioners with any of the benefit they sought in bringing the suit since EPA is not required to reconsider or modify the substance of its decision. And while the remand may provide petitioners another chance to persuade EPA that it was wrong and should revise the NAAQS to provide additional protections to asthmatics, this is the

same opportunity available to every member of the general public.

b. Petitioners assert that when courts review agency decisions not to act, there is no action to be vacated or reversed, and that the decision here begins to define a class of cases in which challenges to agency inaction "may win all there is to win, but still not qualify for an award of fees and costs." Pet. 6. While it is true that a remand may provide a petitioner all the relief that a court is authorized to provide in a particular situation, petitioners here did not "win" a remand that materially benefits them in any way based on any claim they raised. The remand was not premised on a review of the merits of petitioners' claims, a rejection of EPA's rationale, a finding that EPA's action was inconsistent with the Clean Air Act, or any deficiency in the factual evidence. EPA's decision not to revise the NAAQS stands. The Agency is under no obligation to initiate another rulemaking or even to reexamine its prior decision. EPA's only obligation is to provide a further explanation for the decision it did make. Thus, rather than defining a class of cases where fees are denied to parties who "win all there is to win," the court of appeals' decision here simply required these fee petitioners to meet their burden of demonstrating some success on the merits of their claims.

c. Petitioners suggest that they obtained "further relief" that entitles them to attorneys' fees based on a post-remand Settlement Agreement they negotiated with EPA (Pet. 4-5). Under the agreement, which was not filed in the court of appeals or any other court, EPA agreed to take final action on the remand no later than December 2000 and, in exchange, petitioners agreed not to seek rehearing or petition this Court for a writ of certiorari from the original decision. Although peti-

tioners argued to the court of appeals that the post-remand Settlement Agreement provided an alternative basis for fee entitlement, the court plainly did not agree since it denied the fee request. In any event, in cases where EPA has agreed or courts have directed EPA to pay plaintiffs' attorneys' fees for obtaining a schedule for agency action, the Agency has been under a statutory duty to meet a specific deadline. While EPA must complete the remand directed by the court, the court did not order the Agency to complete the remand within any particular time frame, and EPA agreed to a deadline only because petitioners agreed in return that they would not press further appeals of the court's decision.

3. The court of appeals' denial of fees is fully consistent with CAA Section 307(f) and applicable precedents of this Court. While Section 307(f) expanded the class of parties eligible for fee awards, it did not eliminate the requirement that a petitioner must be at least "partially prevailing," achieving "some success" on the merits. *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 688. See also *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. at 791-792 (to be prevailing, a party must succeed on "any significant issue in litigation which achieve[d] some of the benefit * * * sought in bringing suit"). Because petitioners failed to meet this standard, the court of appeals' denial of fees does not undermine congressional intent in enacting Section 307(f).

Nor does *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), authorize attorneys' fees whenever a party obtains a remand, as petitioners contend (Pet. 10). The Court's decision in *Shalala* rested on the distinction between two types of remands available under the Social Security Act—a sentence four remand, which termi-

nates the litigation in a judgment for the plaintiff by reversing the Secretary's denial of benefits, and a sentence six remand, which does not. 509 U.S. at 297-298, 302. As the Court found, a sentence four judgment reversing the Secretary's denial of benefits "certainly meets" the prevailing party requirement that the plaintiff "has succeeded on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit." *Ibid.* (quoting *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. at 791-792).

Because the remand here did not provide any benefit to petitioners or change the legal relationship between EPA and petitioners, the denial of fees in this case is not "at odds with" the result in *Shalala*. Pet. 11. EPA's decision not to revise the SO_2 NAAQS was not vacated. The Agency is not under any obligation to promulgate a new, more stringent SO_2 standard; nor is it required to reconsider its decision not to revise the NAAQS. Moreover, the fact that the remand terminated the litigation, with the court of appeals no longer retaining jurisdiction over the case, does not automatically mean it constitutes a victory for petitioners. The Court's award of fees in *Shalala* was premised not only on the fact that the sentence four order terminated the case with the entry of a final judgment, but also on the ground that it did so in a manner favorable for the plaintiff, reversing the Secretary's denial of benefits. 509 U.S. at 301-302. As a result, the court of appeals' reliance on *Sierra Club* v. *EPA*, 769 F.2d 796 (D.C. Cir. 1985), does not constitute error. That case, consistently with *Ruckelshaus* and *Shalala*, merely requires that a petitioner seeking fees under Section 307(f) must demonstrate at least some success on the merits—a

burden petitioners cannot meet here. See *Sierra Club*, 769 F.2d at 800.

4. The court of appeals' decision denying fees presents no conflict with decisions in other circuits. In the cases cited by petitioners (Pet. 19-22), attorneys' fees were awarded for petitioners' efforts in achieving a remand of agency action. In each of those cases, however, the court reached the merits of petitioners' claims, finding that the agency action was arbitrary or capricious or not consistent with the governing statute. The marked distinction here is that the D.C. Circuit did not reach the merits of any of petitioners' claims—a fact petitioners themselves admit (Pet. 23)—finding that without further explanation, the court could not "review [the Administrator's] decision." Pet. App. 15.

5. Far from opening a "Pandora's box" requiring the court of appeals to speculate concerning the likely outcome of agency proceedings on remand (Pet. 23-24), the court's decision demonstrates a precise focus on the nature of the petitioners' claims, what they sought to achieve in the litigation, and whether the result obtained advanced those goals. Because petitioners did not meet with a "modicum of success" on the merits of their litigation, the court properly found attorneys' fees were not "appropriate." And even if EPA, in conducting proceedings on remand, is confronted with the hurdles that petitioners allege preclude the Agency from "simply re-adopting its initial position" (Pet. 23), these are not hurdles imposed by the court but only hurdles an agency addresses to meet its obligation to conduct reasoned decisionmaking.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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